In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 423 and 424

LOWELL BERNHARDT AND NATHANIEL AGNEW BOYD, ALIAS MATT BOYD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 52-54) is reported at 169 F. 2d 983.

JURISDICTION

The judgments of the Court of Appeals were entered September 27, 1948 (R. 51), and a petition for rehearing was denied October 20, 1948 (R. 54). The petition for writs of certiorari was filed November 16, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to show that the property, allegedly stolen by petitioners, was "property furnished or to be used for the military or naval service" within the meaning of Sec. 36 of the Criminal Code, 18 U.S.C. (1946 ed.) 87 (now 18 U.S.C. 641).

2. Whether the duplicity of the first information constitutes reversible error.

3. Whether there was sufficient evidence to show that the federal employee, allegedly bribed by petitioners, was acting "in his official capacity" within the meaning of Sec. 39 of the Criminal Code, 18 U.S.C. (1946 ed.) 91 (now 18 U.S.C. 201).

4. Whether the trial court's finding that petitioners were guilty as charged was a finding that they were guilty of crimes which were inconsistent with, and repugnant to, each other.

STATUTES INVOLVED

Section 36 of the Criminal Code, as amended, 18 U.S.C. (1946 ed.) 87 (now 18 U.S.C. 641), provided:

> Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property furnished or to be used for the military or naval service, shall be punished as prescribed in section 35(C) of the Criminal Code (U.S.C., title 18, sec. 82).

Section 39 of the Criminal Code, 18 U.S.C. (1946 ed.) 91 (now 18 U.S.C. 201), provided in pertinent part:

> Whoever shall promise, offer or give, or cause or procure to be promised, offered, or given, any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

STATEMENT

After petitioners had waived indictment (R. 2-4), two informations were filed against them and Edwin Gust in the District Court for the Northern District of Ohio. The first information (No.

9401) charged that the three defendants did "steal, embezzle or knowingly apply to their own use and did unlawfully convey and dispose of certain property furnished to or to be used for the military or naval service," to wit, 800 automobile starters valued at $11,400 (R. 4-5). The second information (No. 9402) alleged that Gust was an employee of the United States and that petitioners gave him $400 with intent to influence his action in a matter under his control in his official capacity, and thereby caused him to ship the 800 automobile starters to a point beyond the control of the United States, thus defrauding it of the sum of $11,400 (R. 5-6).

Gust pleaded guilty (R. 7). Petitioners waived a jury trial (R. 7-8). After a trial before the court, petitioners were found guilty as charged, January 26, and were at once orally sentenced to three years' imprisonment on each information, the terms to be served concurrently; in addition they were fined $1200 on the bribery charge (R. 10, 43, 47, 49). On the same day the court filed written judgments reciting that petitioners were convicted of theft of government property under the first information and of bribery under the second information (R. 10-14). The judgments were affirmed on appeal (R. 51).

The evidence for the Government, in so far as pertinent to the issues raised by the petition for

writs of certiorari, may briefly be summarized as follows:

The 800 automobile starters, allegedly stolen by petitioners, were originally used for military purposes by the War Department and stored at the Rossford Ordnance Depot in Wood County, Ohio (R. 22, 23, 24, 33). The War Department had reported them to the War Assets Administration as surplus property (R. 24), and they had been offered for sale by War Assets to buyers having a priority rating (R. 33). The army officers in charge of the depot were, however, still responsible for them until such time as they were shipped from the depot pursuant to an order from War Assets (R. 24).

Gust was Assistant Chief of the Surplus Property Branch at the depot (R. 21, 26). In the absence of his chief he had authority over the receipt, storage and shipment of surplus property at the depot and could order property shipped from the depot pursuant to sale by the War Assets (R. 21-22, 26).

Petitioners were heavy buyers of surplus material at the depot through War Assets, and Gust had met them in the course of his official business (R. 22, 23, 25-26). Petitioners suggested to Gust that "it was possible to get some of the material out of there without going through War Assets or, off the record, make some easy money" (R. 26). Gust knew that War Assets had no record of certain

property at the depot which had been declared surplus by the War Department (R. 29), and he gave petitioners a list of items, including the starters, which he could ship out of the depot without anyone knowing it (R. 26, 29-30). Petitioners told Gust that they would pay him $400 to ship the starters to them and they gave him a shipping address in Detroit (R. 26-27, 30). Gust, in the absence of his chief, wrote an order directing delivery of the starters to the address in Detroit; this order he gave to a clerk to write up and as a result the starters were eventually delivered by truck in Detroit (R. 27, 29, 32). The driver of the truck was met in front of the shipping address by a man who took him to a warehouse in the next block, had him deliver the starters there, and gave him a receipt signed "S. Swagort" (R. 34-35). Petitioners paid Gust $400 after the delivery (R. 28). There was evidence that the signature "S. Swagort" had been written by petitioner Boyd and that some of the boxes used to ship the starters were later found in petitioners' warehouse (R. 35-42).

Petitioners moved for judgments of acquittal at the close of the Government's case. The motion was overruled and petitioners did not take the stand or offer any evidence in their own behalf. (R. 43.)

ARGUMENT

1. Petitioners contend (Pet. 9-10) that there was no evidence to support their convictions upon the

first information, which charged them with theft of property furnished for military service, for the reason that the testimony showed that the starters, having been declared surplus, had passed from the control of the army to the control of the War Assets Administration. But it is undisputed that the starters were furnished for military purposes (R. 23), and the executive officer of the depot testified that the Army was responsible for them as long as they were physically present on the premises (R. 24). This was in accordance with the terms of the Surplus Property Act, which provides (50 U.S.C. App. 1620(d))[1] that under certain circumstances the responsibility for the "care and handling" of surplus property shall not pass to the disposal agency pending its disposition. We think it clear that the starters would not have lost their character as property "furnished for the military service" until title had passed from the United States or the Army had been relieved of responsibility for them. The cases cited by petitioners to support their contention are not in point. *United States* v. *Murphy,* 9 Fed. 26 (C.C. S.D. Ohio), involved clothing issued to inmates of the National Military Home who were not in the military serv-

[1] "* * * Where the disposal agency is not prepared at the time of its designation * * * to undertake the care and handling of such surplus property the Surplus Property Administrator may postpone the responsibility of the agency to assume its duty for care and handling for such period as he deems necessary to permit the preparation of the agency therefor."

ice. In *O'Kelley* v. *United States,* 116 F. 2d 966 (C.C.A. 8), goods allegedly stolen from an interstate shipment had lost their interstate character because delivery to the consignee had already been accomplished.

2. The first information charged petitioners in the disjunctive with crimes involving inconsistent elements—theft or embezzlement[2] (*supra,* p. 4). But petitioners failed to make any complaint on this score at any stage of the trial proceedings, and the objection (Pet. 10-12) is obviously too late. If petitioners had felt themselves handicapped in preparing a defense they could have moved in the trial court that the Government be required to elect which theory it desired to adopt, and the information could then have been amended. See Rule 7(e), F. R. Crim. P. But the defect is a technical one which is cured by verdict if not previously attacked by motion. *Wiborg* v. *United States,* 163 U. S. 632, 646-648; *Durland* v. *United States,* 161 U. S. 306, 315; *Beauchamp* v. *United States,* 154 F. 2d 413, 415 (C.C.A. 6), certiorari denied, 329 U. S. 723; *Yates* v. *United States,* 151 F. 2d 580, 581 (C.C.A. 9). *Edwards* v. *United States,* 266 Fed. 848 (C.C.A. 4), cited by petitioners for the proposition that the objection can be raised in the appellate courts, is not in point, for the indictment in that case failed to state any offense sufficiently. Peti-

[2] It should be noted that the opinion of the court below mistakenly states that it was the second information which laid this charge (R. 53).

tioners make no showing that their defense was in the least prejudiced by the duplicity. Nor were they injured by the fact that they were found "guilty as charged," for the written judgment filed the same day that they were pronounced guilty (*supra*, p. 4) made it clear that they had been convicted of theft alone under the first information.

3. Petitioners contend (Pet. 13-15) that their conviction under the second information cannot be sustained for the reason that the evidence did not establish that Gust was acting "in his official capacity," within the meaning of the bribery statute, in shipping the starters to them. They argue that the "care, handling and disposition" of the starters had passed to War Assets and that Gust, an employee of the War Department, had no authority over them. But this ignores the fact that under the Surplus Property Act the "care and handling" of the property may remain in the Army pending disposition by War Assets (*supra*, p. 7), and it ignores the evidence that the Army was still responsible for the care and handling of the starters (*supra*, p. 5) and that Gust, in the absence of his superior, had authority to do just what he did, *i.e.*, to order them shipped out of the depot (*supra*, p. 5). We submit that Gust clearly had an official function to perform in respect of this property, and that the case is therefore governed by *United States* v. *Birdsall*, 233 U. S. 223, in which the defendant was convicted of bribing employees of the

Interior Department "with intent to influence their official action so that they would advise the Commissioner of Indian Affairs, contrary to the truth, that upon facts officially known to them leniency should be granted" to persons who had been convicted of selling liquor to Indians. Gust's position is obviously distinguishable from that of the baggage porter in *Krichman* v. *United States*, 256 U. S. 363, relied upon by petitioners, for the porter was merely an employee of the Pennsylvania Railroad at a time when it was being operated by the Government and he had no official authority whatever over certain trunks which he was bribed to deliver to the defendant.[3]

4. We fail to perceive any merit in petitioners' contention (Pet. 16-18) that they were convicted of repugnant offenses. As the Court of Appeals pointed out (R. 53), the bribery here was designed to facilitate the theft. Gust was bribed to exercise his official position in such a manner as to enable petitioners to steal the surplus starters. Furthermore, there was abundant evidence to support the conviction under the bribery information, and since the lesser penalty inflicted under the theft information was made to run concurrently with the

[3] Similarly, the instant case is readily distinguishable from *Blunden* v. *United States*, 169 F. 2d 991, decided at about the same time by another panel of the Court of Appeals for the Sixth Circuit. In the *Blunden* case, the government employee allegedly bribed had no authority to deliver surplus property outside the depot; furthermore, he delivered non-surplus property on the representation that it was surplus.

heavier penalty for bribery, the asserted repugnance is immaterial.

The trial court's finding of guilty as charged was not, as petitioners assert (Pet. 18), a "general verdict," leaving it uncertain of which offense they had been convicted. The record makes it clear that they were found guilty and sentenced under both the theft information and the bribery information (R. 10-14, 47, 49).

CONCLUSION

The decision of the Court of Appeals is correct and no conflict of decisions is involved. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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